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IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 216

THE B. F. GOODRICH COMPANY,
Petitioner,

—against—

NORTHWEST INDUSTRIES, INC. and
INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	9
Conclusion	15
Appendix A:	
Statutes Involved	A1
Appendix B:	
Opinion of the United States Court of Appeals for the Third Circuit	A6
Judgment of the United States Court of Appeals for the Third Circuit	A20
Opinion of the United States District Court for the District of Delaware	A21
Order of the United States District Court for the District of Delaware	A36

TABLE OF AUTHORITIES.

Cases:

	Page
Alleghany-Control and Purchase, 109 M. C. C. 333 (1970)	9
Central of Georgia Ry. Co. Control, 307 I. C. C. 39 (1958), 312 I. C. C. 125 (1960)	11
Denver & Rio Grande Western R. Co. v. United States, 387 U. S. 485 (1967)	12
East Texas Motor Freight Lines, Inc.—Control and Merger, 109 M. C. C. 213 (1969)	9
Fitzgerald v. Pan American World Airways, 229 F. 2d 499 (2d Cir. 1956)	14
J. I. Case Co. v. Borak, 377 U. S. 426 (1964)	12
Most v. Alleghany Corp., CCH Fed. Sec. L. Reptr. ¶ 92,583 (S. D. N. Y. 1970)	3, 13
Pennsylvania Motor T. Ass'n v. Port of Phila. M. T. Ass'n, 183 F. Supp. 910 (E. D. Pa. 1960)	14
Pennsylvania R. Co. v. United States, 363 U. S. 202 (1960)	11
River Plate & Brazil Conf. v. Pressed Steel Car Co., 227 F. 2d 60 (2d Cir. 1955)	14
Roosevelt Field v. Town of N. Hempstead, 84 F. Supp. 456 (E. D. N. Y. 1949)	14
Schechtman v. Wolfson, 244 F. 2d 537 (2d Cir. 1957)	14
United States v. Northwest Industries, Inc., 301 F. Supp. 1066 (N. D. Ill. 1969)	7
United States Freight Co.—Investigation of Control, 45 M. C. C. 352 (1947)	11
Wills v. Trans World Airlines, Inc., 200 F. Supp. 360 (S. D. Cal. 1961)	14

TABLE OF AUTHORITIES (Continued).

Statutes:

	Page
Title 28 of the United States Code:	
28 U. S. C. § 1254(1)	2
28 U. S. C. § 1336	6, 9
28 U. S. C. § 1337	3, 14
28 U. S. C. § 2201	7
28 U. S. C. § 2202	8
Interstate Commerce Act, 49 U. S. C. § 1 et seq.:	
49 U. S. C. § 1(3)(b)	2, 10
49 U. S. C. § 5	2, 6, 9, 12, 13
49 U. S. C. § 5(2)	2, 4, 5, 9, 10, 12
49 U. S. C. § 5(2)(b)	7, 8, 9, 10, 11, 12, 13
49 U. S. C. § 5(2)(c)	10
49 U. S. C. § 5(2)(d)	10
49 U. S. C. § 5(2)(e)	10
49 U. S. C. § 5(4)	2, 4, 5, 10
49 U. S. C. § 5(7)	4, 5
49 U. S. C. § 5(11)	13
49 U. S. C. § 10	10
49 U. S. C. § 20a	4, 5
Clayton Act, 15 U. S. C. § 12 et seq.	14
15 U. S. C. § 19	14
Federal Aviation Act of 1958, 49 U. S. C. § 1301 et seq.	14
Securities Exchange Act of 1934, 15 U. S. C. § 78 et seq.:	
15 U. S. C. § 78n	12
15 U. S. C. § 78n(a)	12
15 U. S. C. § 78n(b)	12
15 U. S. C. § 78n(d)	12
15 U. S. C. § 78aa	13
Shipping Act, 1916, 46 U. S. C. § 801 et seq.	14
Rule 41 of the Federal Rules of Appellate Procedure	8

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The B. F. Goodrich Company ("Goodrich") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on April 14, 1970.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court is reported at 303 F. Supp. 53 and is printed in full in this petition, Appendix B, p. A21; the opinion of the Court of Appeals has not yet been officially reported, but is printed in full in this petition, Appendix B, p. A6.

JURISDICTION

The judgment of the Court of Appeals was entered on April 14, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Does a private right of action lie by a target corporation (Goodrich) which controls a motor carrier to compel a corporation (Northwest Industries, Inc. ("Industries")) which controls rail carriers to comply with the provisions of Section 5 of the Interstate Commerce Act ("Act") applicable to the latter's attempt to acquire control of the target corporation?

STATUTES INVOLVED

Sections 1(3)(b), 5(2) and 5(4) of the Interstate Commerce Act, 49 U.S.C. §§1(3)(b), 5(2), 5(4), are printed in Appendix A, p. A1.

STATEMENT OF THE CASE

The issue raised by this petition is whether a target corporation should be left remediless in the face of the announced refusal of a corporation seeking to acquire control of the target to obtain required prior approval and authorization for the proposed acquisition of control of the target from a regulatory agency which has evidenced no willingness to compel compliance with the congressional mandate. This issue has broad implications respecting evasion of statutes governing acquisitions of control of corporations, not just in the transportation industry, but in all regulated industries.

The jurisdiction of the District Court was invoked under 28 U.S.C. §1337 because the complaint presented a question arising under the Interstate Commerce Act (R 3a).* A District Court in another circuit has, contrary to the decision below, held that in a private action jurisdiction lies under 28 U.S.C. §1337 to consider a violation of the very sections of the Interstate Commerce Act here in issue. See *Most* v. *Allegheny Corp.*, *infra*.

Petitioner Goodrich owns all of the issued and outstanding shares of Motor Freight Corporation ("Motor Freight"), an Indiana motor common carrier subject to Part II of the Interstate Commerce Act which operates under certificates of convenience and necessity issued by the Interstate Commerce Commission (R 12a).

Respondent Industries operates as a conglomerate holding company with interests in many fields, including an approximately 99 per cent holding of the voting stock of the Chicago & North Western Railway Company ("North

* Parenthetical page references are to the certified copy of the joint appendix to the briefs filed with the Third Circuit Court of Appeals, which appendix has been stipulated pursuant to Rule 21 of the Rules of the Supreme Court to be the entire record in this case.

Western"), a common carrier by rail subject to Part I of the Act and direct or indirect control of other railroads (R 12a-13a, 46a).

Respondent Interstate Commerce Commission was not named as a defendant in Goodrich's complaint to the District Court, but requested, and was granted, leave to intervene just prior to the hearing (R 119a, 121a).

On January 20, 1969, Ben W. Heineman ("Heineman"), chief executive officer of Industries, made a public announcement of Industries' proposed exchange offer for any and all shares of Goodrich common stock (R 20a-22a). Heineman stated that Industries already held a block of Goodrich stock and would continue to buy Goodrich stock from time to time (R 20a). In April of 1969, Industries' registration statement containing the terms of its revised tender offer was made effective by the Securities and Exchange Commission (R 13a).

Industries made no effort to obtain the approval and authorization of the Commission pursuant to the requirement of Section 5(2) of the Act, and publicly and before the Commission announced that it would not follow the mandatory statutory procedures (R 27a, 96a). Goodrich had earlier petitioned the Commission under Section 5(7) of the Act to invoke its discretion to investigate Industries' attempt to acquire control of Goodrich and thereby of Motor Freight in disregard of Section 5(2)'s requirement of prior Commission approval and authorization and in violation of Section 5(4) of the Act (R 83a), and to subject the issuance of the "package" of securities which Industries was offering to exchange for Goodrich shares to the prior approval requirement of Section 20a of the Act (R 80a). It was in the Commission's power to subject Industries, a carrier holding company, to the requirements of that section. Industries' response to Goodrich's petition under

Section 5(7) was that it believed it could obviate the need to meet the requirements of Section 5(2) by selling the stock of Motor Freight owned by Goodrich or, pending such sale, placing the stock into a voting trust (R 27a, 96a). To state the obvious, neither alternative "solution" could be effected without Industries' first illegally acquiring control of Goodrich.

The Commission granted Goodrich standing to intervene in proceedings involving Industries' rail subsidiary, North Western, but, as it had the right to do, refused to exercise its discretion to investigate or to subject Industries' securities issuances to Commission scrutiny under Section 20a. Order of April 24, 1969, Finance Dockets Nos. 23388 and 89 (R 8a). Goodrich does not now complain, nor did it below, of these determinations. But as Goodrich reads it, and as Goodrich submits it must be read, the Commission's order did not approve or authorize Industries' intended acquisition, of control of Goodrich and Motor Freight; nor did it find or conclude that such acquisition without Commission approval and authorization would be lawful under Sections 5(4) and 5(2) of the Act. Rather, the Commission merely observed in a recital that preceded the ordering paragraph that Industries had stated that upon acquiring control of Goodrich it planned to sell Motor Freight to a non-affiliated non-carrier or, pending such sale, place Motor Freight's stock in the hands of a putatively independent voting trustee, and that the Commission had once held in the past in respect of other carriers that the placing of stock in an independent voting trust, "with necessary restrictions," constituted in that earlier proceeding a divestiture of control (R 9a-10a). Goodrich sought no review of the Commission's order as it ordered nothing in respect of the issue presented here.

The Commission's order made no attempt to explain how divestiture could be accomplished without Industries'

first acquiring control of Motor Freight, how such control could be lawfully acquired in the absence of any effort on the part of Industries to secure prior approval and authorization from the Commission as required by the Act, how the independence of the voting trustee was to be evaluated prior to such trustee's "assumption of control," or what constituted the "necessary restrictions" under the proposed voting trust. Indeed, the Court of Appeals twice noted in its opinion below that the Commission's order was at least inept, stating that "the Commission's order is not precisely worded," Appendix B, p. A10, and that it is "not crystal clear," Appendix B, p. A13.

It is not unreasonable to speculate that had Goodrich read the order as the Court of Appeals did, and had it sought to have that order reviewed by a three-judge court pursuant to 28 U.S.C. §1336, as the Court of Appeals suggests it should have, Goodrich would have been met at the threshhold with jurisdictional objections that the order did not uphold Industries' resort to a voting trust as constituting compliance with Section 5 of the Act, and that there was nothing in the order for the three-judge court to "enjoin, set aside, annul or suspend." 28 U.S.C. §1336. Moreover, such objections would have been sound. This suggests yet another broad public policy issue raised by this petition, at least if it be assumed that the Court of Appeals correctly construed the Commission's order: Whether, if an administrative agency cannot write an order which reasonable men can read as constituting a disposition on the merits, the aggrieved party should be given the benefit of the doubt, so that he need not at his peril pursue what cannot be determined to be the "wrong" avenue of relief until resort has been had to the appellate courts. Surely the burden should be on the agency to write an order that cannot fairly be misconstrued.

Although Industries had earlier told the Commission that it would sell or, pending sale, trustee the stock of Motor Freight if it obtained control of Goodrich, serious doubt was cast on Industries' ability to effect any such plan by a subsequent "hold separate" order of the District Court for the Northern District of Illinois, obtained July 17, 1969, by the United States in an antitrust suit (R 111a). *United States v. Northwest Industries, Inc.*, 301 F. Supp. 1066 (N. D. Ill. 1969). The order, which takes effect if Industries "shall obtain ownership of or control over 25% or more of the outstanding common stock of" Goodrich, requires Industries, among other things, "to preserve and protect all assets of" Goodrich and restrains Industries from, among other things, "[t]aking any action which will substantially diminish the operations of [Goodrich] or [disposing] of any assets of [Goodrich] except in the ordinary course of business, without further order of this Court. . . ." (R 116a). 301 F. Supp. at 1099. Prior to the issuance of this order, Industries advised the Commission that it planned to sell Motor Freight or, pending such sale, place control of Motor Freight in an independent voting trust (R 96a, 9a-10a). Since issuance of the order, however, Industries has not modified its intention to sell Motor Freight or to trustee its stock should the desired control of Goodrich be obtained.

On July 25, 1969, Goodrich filed the instant suit against Industries in the District Court for the District of Delaware (R 35a), and, before hearing, the Commission intervened as defendant (R 119a, 121a). Goodrich sought from the District Court an order pursuant to 28 U.S.C. §2201 declaring it unlawful for Industries to obtain control of Goodrich and thereby of Motor Freight without Industries' first obtaining the approval and authorization of the Commission pursuant to Section 5(2)(b) of the Act (R 7a). (Goodrich also sought a preliminary and a permanent injunction pur-

suant to 28 U.S.C. §2202 (R 7a), subsequent denial of which is not here challenged.)

On August 11, 1969, the District Court, Judge Steel presiding, entered its order, Appendix B, p. A36, dismissing Goodrich's complaint for "lack of subject matter jurisdiction," 303 F. Supp. at 57. Judge Steel reasoned that he could not issue the requested declaratory order without first determining the issue of "control" under Section 5(2)(b), and that exclusive primary jurisdiction to resolve this issue resided in the Interstate Commerce Commission. Also on August 11, 1969, Industries' exchange offer, as extended three times, expired by its own terms (R 52a).

On August 25, 1969, an appeal was taken to the Court of Appeals for the Third Circuit (R 256a). On April 14, 1970, that court entered its judgment affirming the lower court's dismissal of Goodrich's complaint. Appendix B, p. A20. Judge Adams, writing for the court, shifted the basis for justifying the dismissal. As noted in the opinion below, he had no problem with what all parties concede was a clear purport to acquire "control" and found it unnecessary to reach the issue of primary jurisdiction, Appendix B, p. A19, but, instead, concluded that jurisdiction below was lacking because (1) Goodrich's suit was a collateral attack on the Commission's order of April 24, 1969, Appendix B, p. A10, and (2) Goodrich's suit failed to state a federal cause of action because, as a matter of statutory construction, private litigants are barred by the Act from initiating judicial proceedings to compel obedience to it, Appendix B, p. A14.

On May 6, 1969, Judge Adams signed an order pursuant to Rule 41 of the Federal Rules of Appellate Procedure staying the mandate of the Court of Appeals for 30 days.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals raises serious and recurring problems concerning the rights of corporations and their shareholders to defend against exchange offers designed to effect changes of control in violation of federal regulatory statutes.

Throughout this litigation there has never been any serious dispute that Industries' voting trust device is ineffective to prevent violation of the Act upon successful consummation of the contemplated takeover of Goodrich. The Court of Appeals itself conceded that "[a]dmittedly there is no dispute regarding the meaning of control in the present case." Appendix B, p. A17. And although the court went on to suggest the existence of an issue of fact concerning the effectiveness of the voting trust, recent Commission decisions establish that, even if effective to divest control and thereby to cure a past violation of the Act, the voting trust is not available as a means of prospectively circumventing the applicability of Section 5(2). *Alleghany-Control and Purchase*, 109 M.C.C. 333 (1970); *East Texas Motor Freight Lines, Inc.—Control and Merger*, 109 M.C.C. 213 (1969).

Despite the clear victimization of Goodrich by Industries' unlawful course of conduct, the Court of Appeals has decided, in effect, that there can be no remedy against Industries. The Commission has refused to act. Suit against the United States in a three-judge court pursuant to 28 U.S.C. §1336 is not available because the Commission has declined to issue a meaningful, reviewable order. Suit by Goodrich against Industries to compel application by it to the Commission as required by Section 5(2) (b) of the Act is not possible, the Court of Appeals concluded, because there is in Section 5 of the Act no express authorization for a suit by a private party against an aggressor corpora-

tion guilty of an unlawful takeover attempt, thus necessarily evincing a legislative intent to render a private party in these circumstances powerless to invoke the requirements of the Act in its own defense.

This conclusion should be rejected for three reasons. First, as tender offers become increasingly common, and thus more difficult to police, target corporations should not be left to the questionable mercy of regulatory agencies which are at times overburdened with other tasks or insensitive to the necessity of compelling compliance with the statute which they are charged with administering.

Second, a regulatory agency should not be free to distort the intent of Congress by gouging exceptions of expediency into a carefully structured statuatory framework. The scheme and the language of Section 5(2) of the Act expressly require that contemplated acquisitions of control of carriers be submitted for the Commission's approval and authorization while they are in the planning stage and *before* they are consummated. Indeed, in specifying the kinds of transactions for which advance approval and authorization are necessary, Congress used the words "proposed transaction," or variations thereof, no less than 11 times in Sections 5(2) (b), (c) and (d), as well as other words and phraseology envisioning Commission evaluation of acquisitions of control prior to their effectuation. See, e.g., Section 5(2) (c) ("No transaction which contemplates . . . ."). While allowance of Goodrich's suit would not disturb the harmony of the Act's various provisions (in fact, its only effect would be to encourage obedience to the Act), permitting the Commission to condone criminal conduct (49 U.S.C. §10) would be a jarring note. The act (Sections 1(3) (b) and 5(4)) makes clear that creation of a voting trust does not preclude the continued existence of illegal control. Commission cases reveal the rigorous examination to which curative voting trust agreements are

invariably subjected, *Central of Georgia Ry. Co. Control*, 307 I.C.C. 39, 43 (1958), 312 I.C.C. 125, 135-37 (1960); *United States Freight Co.—Investigation of Control*, 45 M.C.C. 352 (1947). (No case has been found in which a court or the Commission has given *advance* permission to use a voting trust without first requiring approval of the underlying transaction). Even in the recital in its order of April 29, 1969, the Commission conceded, by use of the phrase "with necessary restrictions" (R 31a), that not every voting trust would satisfy its relaxed view of the statutory requirements.

Third, a regulatory agency should not be permitted to hamstring an aggrieved party by issuing an order so unclear in its intent as to be virtually non-reviewable. The Commission's recital paragraph, which the Court of Appeals concluded was reviewable "although not crystal clear," was in fact so indecisively worded as to constitute merely an abstract declaration review of which is precluded by decisions of this Court. *Pennsylvania R. Co.* v. *United States*, 363 U.S. 202, 205 (1960). It is no surprise that the Commission chose not to write a final, reviewable order in terms that would clearly express its abdication of statutory responsibility in condoning in advance Industries' substitution of a voting trust for the approval and authorization required by Section 5(2) (b) of the Act, not only because there is no statutory authorization for such a procedure, but also because the Commission did not have before it a definitive voting trust agreement or sufficient facts to evaluate the effectiveness of Industries' proposed voting trust even assuming its use in such circumstances would insulate Industries from the requirements of the Act.

Even were the Commission's language susceptible of a *post facto* judicial construction arguably rendering it reviewable as an order rather than recognizing it as a non-reviewable abstract declaration, the public interest is ill-served by compelling aggrieved parties correctly to pre-

dict which reading will ultimately be adopted at peril of being dismissed for failure to divine the true meaning of the Commission's runic observations. This Court has "stressed the unsatisfactory consequences which often occur when agencies defer action and leave parties uncertain as to their rights and obligations." *Denver & Rio Grande Western R. Co.* v. *United States*, 387 U.S. 485, 499 (1967). Even more unsatisfactory is it when the agency leaves the parties uncertain (if the Court of Appeals be correct) as to what, if anything, it has done while simultaneously nullifying the possibility of clarification by direct review.

2. The decision of the Court of Appeals conflicts directly or in principle with decisions of this Court and with those of other federal courts.

In *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), this Court decided that federal district courts had the power to "grant all necessary remedial relief," 377 U.S. at 435, to private litigants suing under the SEC's proxy rules, promulgated pursuant to Section 14 of the Securities Exchange Act of 1934, 15 U.S.C. §78n. The purpose of that provision of the Exchange Act (which has recently been amended to include tender offers within its regulatory scope) is to ensure that attempts to retain or acquire control of corporations are conducted in a manner consistent with "the public interest or . . . the protection of investors." 15 U.S.C. §§78n (a), (b), (d). The purpose of the Interstate Commerce Act's prior approval and authorization requirement for control transactions involving common carriers, 49 U.S.C. §5(2), is to ensure that such transactions are "consistent with the public interest," 49 U.S.C. §5(2) (b). Thus, while the Exchange Act's proxy requirements are not limited to control situations involving common carriers, as is Section 5 of the Interstate Commerce Act, both laws seek to promote the public's interest where control of corporations is concerned. It would be anomalous to grant a private

right of relief to stockholders whose corporation is subjected to takeovers violative of the Exchange Act while denying such a right in the limited sense in which it is here sought to the corporation itself when it is threatened with a takeover in violation of provisions of the Interstate Commerce Act which seek to accomplish substantially similar goals. This anomaly is not resolved by reference to the jurisdictional sections of the two statutes, for neither law expressly creates a private right of action based on the control provisions discussed above. (Section 27 of the Exchange Act, 15 U.S.C. §78aa, merely confers jurisdiction on particular courts, it does not create substantive remedies.) This is especially true here, where the private right of action can in no way intrude on the areas of the Commission's expertise or do violence to a regulatory pattern. The right here contended for is not a right to substitute private views for those of the Commission as to what constitutes control or a change of control, nor to impose conditions on approval of changes of control, but only to support the regulatory scheme by compelling obedience thereto by a recalcitrant regulated company. Such advancement of the policy of Section 5 should be encouraged, not impeded. Since, in the context of takeover bids, the litigant most likely to assert and thus protect that policy is the unwilling target, it should not be disabled from doing so merely because it is a private party.

At least one federal court has recognized that a private action may be maintained under Section 5 of the Commerce Act. In *Most* v. *Alleghany Corp.*, CCH *Fed. Sec. L. Reptr.* ¶92,583 (S.D.N.Y. 1970), Judge Wyatt denied a motion to dismiss for lack of subject matter jurisdiction a claim based on defendants' failure to seek the Commission's approval under Section 5(2) (b) of the Act for a common carrier change of control transaction, rejecting the contention that Section 5(11)'s grant of "exclusive and plenary"

power to the Commission in Section 5, matters in any way limited the District Court's jurisdiction to entertain a private suit predicated on violations of Section 5(2). The *Most* case has not been appealed, but as it stands, it is in direct conflict with the Third Circuit Court of Appeal's decision in the instant suit.

The decision of the Court of Appeals is also inconsistent with principals enunciated in many cases implying private causes of action in statutory contexts other than the Interstate Commerce and Securities Exchange Acts:

Federal Aviation Act of 1958 (and predecessor statutes), 49 U.S.C. §1301 et seq.: Fitzgerald v. Pan American World Airways, 229 F. 2d 499 (2d Cir. 1956); *Wills v. Trans World Airlines, Inc.*, 200 F. Supp. 360 (S.D. Cal. 1961); *Roosevelt Field v. Town of N. Hempstead*, 84 F. Supp. 456 (E.D.N.Y. 1949).

Shipping Act, 1916, 46 U.S.C. §801 et seq.: River Plate & Brazil Conf. v. Pressed Steel Car Co., 227 F. 2d 60 (2d Cir. 1955); *Pennsylvania Motor T. Ass'n v. Port of Phila. M.T. Ass'n*, 183 F. Supp. 910 (E.D. Pa. 1960).

Clayton Act, 15 U.S.C. §12 et seq.: Schechtman v. Wolfson, 244 F. 2d 537 (2d Cir. 1957).

In each of these cases involving an "Act of Congress regulating commerce," 28 U.S.C. §1337, plaintiffs were permitted to assert causes of action based on statutes which did not expressly provide for them. Indeed, in *Schechtman v. Wolfson, supra*, the court recognized a cause of action to enforce §7 of the Clayton Act, 15 U.S.C. §19 (prohibiting interlocking directorates in certain cases), even though elsewhere in the statute it clearly states that "[a]uthority to enforce compliance with [15 U.S.C. § 19] . . . . is vested in" the Federal Trade Commission generally and in the Interstate Commerce Commission where common carriers are concerned.

CONCLUSION

For the foregoing reasons this petition for certiorari should be granted.

Dated: Wilmington, Delaware
June 2, 1970

Respectfully submitted,

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APPENDIX A

STATUTES INVOLVED

Interstate Commerce Act §1(3)(b), 49 U. S. C. §1(3)(b).

For the purposes of sections 5, 12(1), 20, 304(a) (7), 310, 320, 904(b), 910, and 913 of this title, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control.

Interstate Commerce Act §5(2), 49 U. S. C. §5(2).

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock, or otherwise; or for a person which is not a carrier to acquire control of two or more carriers

through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(iii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305 (e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: PROVIDED, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affili-

ated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transactions, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or fixed charges, shall be approved by the Commission under this paragraph except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph which will result in an increase of total fixed charges, except

upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Interstate Commerce Act §5(4), 49 U. S. C. §5(4)

It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subdivision (a) of paragraph (2) of this section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders,

a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5) of this section, the words 'control or management' shall be construed to include the power to exercise control or management.

APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

(April 14, 1970)

No. 18191

THE B. F. GOODRICH COMPANY

v.

NORTHWEST INDUSTRIES, INC., AND INTERSTATE COMMERCE COMMISSION

THE B. F. GOODRICH COMPANY, A CORPORATION OF THE STATE OF NEW YORK,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued March 6, 1970

Before SEITZ, VAN DUSEN, and ADAMS, *Circuit Judges*

ADAMS, *Circuit Judge*

The primary issue in this case is whether a corporation whose stock is sought by a company under the jurisdiction of the Interstate Commerce Commission (Commission) may institute a private action to enjoin an alleged violation of

§5 of the Interstate Commerce Act (Act), or whether it must pursue its prior complaint before the Commission and then if dissatisfied appeal the decision of the Commission to a three-judge court.

In the present suit, B. F. Goodrich Company (Goodrich) seeks in effect to enforce Section 5(2) of the Act[1] by an action in the District Court of Delaware requesting an injunction to restrain Northwest Industries, Inc. (Industries) from acquiring Goodrich stock without first obtaining Commission approval, and an order declaring such action unlawful without Commission approval.[2] The basic contention in the Goodrich complaint is that control of Goodrich by Industries without Commission approval would violate Section 5(2) because it would result in control of a carrier (Goodrich acquired control of a motor carrier) by a company (Industries) which is not a carrier but has control of one or more carriers.

Goodrich is a New York corporation whose stock is traded on the New York Stock Exchange. Industries, a Delaware corporation, is a conglomerate holding company whose interests include approximately 99 percent of the voting stock of Chicago & North Western Railway Company (North Western), as well as direct or indirect control of other railroads. North Western is a common rail carrier subject to the Act.

On January 20, 1969, Industries made a public announcement that it would offer to exchange certain of its securities for Goodrich stock. Goodrich sought to prevent

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1 Section 5(2)(a)(i), 49 U.S.C. 5(2)(a)(i) provides in pertinent part: "It shall be lawful, with the approval and authorization of the Commission * * * for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier * * *."

2 Jurisdiction is asserted pursuant to 28 U.S.C. § 1337. Relief was sought pursuant to 28 U.S.C. §2202, §2201.

this acquisition by filing, on January 27, 1969, a petition with the Commission for leave to intervene in the Chicago and North Western Railway Company-Merger proceeding, then pending before the Commission.[3] In the petition, Goodrich also endeavored to reopen the proceeding with the Commission, complaining that Industries should be subject to certain portions of Section 20 of the Act.[4]

On March 4, 1969, Goodrich purchased all the outstanding shares of Motor Freight Corporation, a motor carrier subject to the Act, which operates under certificates of public convenience and necessity issued by the Commission. Industries did not apply to the Commission for approval of its acquisition, and indicated that it did not intend to do so. On March 7, 1969, Goodrich filed with the Commission its "Supplement to Amended and Supplemental Petition", which advised the Commission of Goodrich's ownership of Motor Freight. It contended that the acquisition of Goodrich by Industries would violate Section 5(2) of the Act in that a "person [Industries] which is not a carrier and which has control of one or more carriers" would "acquire control of another carrier" [Motor Freight] without the approval of the Commission.[5]

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3 Chicago and North Western Railway Co.-Merger-Chicago Great Western Railway Co., Fin. Docket No. 23388.

4 Section 20, 49 U.S.C. § 20, requires certain carriers to make reports or submit records or accounts to the Commission.

5 49 U.S.C. § 1(3)(b), provides: "For the purposes of sections 5, * * * of this title, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operations, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control."

Industries answered, on March 10, 1969, that its acquisition of Goodrich would not violate the Act because "simultaneously with acquisition of control of Goodrich, the stock of Motor Freight Corporation will be sold to a non-affiliated non-carrier [and] pending sale, complete control of such motor carrier will be placed in an independent voting trustee."

The Commission issued an order, on April 24, 1969, granting Goodrich the right to intervene in the proceeding, reopening the proceeding for the "sole purpose" of subjecting Industries to the provisions of Section 20(5) of the Act, and denying the petition "in all other respects." In the order the Commission indicated that it found Industries' plan of divestiture acceptable to preclude a violation of the Act, stating,

> "* * * simultaneously with acquisition of control of B. F. Goodrich Company the stock of Motor Freight Corporation will be sold to a non-affiliated non-carrier, or, pending sale, complete control of such motor carrier will be placed in an independent voting trustee, that the Commission has held in the past that the placing of stock in an independent voting trust, with necessary restrictions, constitutes divestiture of control * * *".

On July 25, 1969, Goodrich filed a complaint in the District Court of Delaware for a declaratory judgment and injunction,[6] and the Commission intervened.

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6 On May 21, 1969, the United States Government had filed a complaint against Industries alleging that the consummation of an exchange offer by Industries would violate the Clayton Act. The Government also sought injunctive relief. On July 11, 1969, District Judge Will denied the Government's motion, but entered an order which provided that if Industries proceeded with its acquisition proposal it was to maintain Goodrich as a separate viable going concern. United States v. Northwest Industries, 301 F. Supp. 1066 (N.D. Ill. 1969).

Judge Steel granted the Commission's motion to dismiss the complaint, and denied Goodrich's motion for a preliminary injunction. The basis for his order was (1) lack of jurisdiction over the subject matter in that there is no *private right* of action for enforcement of Section 5(2) of the Act, (2) Goodrich had exhausted its administrative remedy unsuccessfully and therefore the "doctrine of primary jurisdiction requires this Court to respect the administrative ruling implicit in the Commission's decision", and (3) there was insufficient danger of irreparable harm to Goodrich or likelihood of a violation of a statute by Industries to warrant the issuance of a preliminary injunction. [B. F. Goodrich Co. v. NorthWest Industries, Inc., 303 F. Supp. 53, 60 (D. Del. 1969)]. Goodrich then appealed the dismissal of the complaint to this Court, but not the refusal to grant the injunction.

We agree that the District Court had no jurisdiction over the Goodrich complaint. The complaint was in substance a collateral attack on an order of the Commission and an attack on such an order may be brought only before a three-judge court convened pursuant to 28 U.S.C. § 2325. Venner v. Michigan Central Railroad Co., 271 U.S. 127 (1926); Lambert Run Coal Co. v. B & O Railroad Co., 258 U.S. 377 (1922); Suffin v. The Pennsylvania Railroad Co., 396 F.2d 75, 76 (3d Cir. 1968) cert. denied, 393 U.S. 1062; Schwartz v. Bowman, 244 F. Supp. 51 (S.D.N.Y. 1965) (extensive citations at 67), aff'd. *sub nom.* Annenberg v. Allegheny Corp., 360 F.2d 211 (2d Cir. 1966), cert. denied, 385 U.S. 921.

Although the Commission's order is not precisely worded, it is clear that the Commission dealt with the same contentions made by Goodrich in the District Court. Goodrich contended in its March 7, 1969, petition before the Commission, as it did in the District Court and continues to do here, that Industries, which held 99 percent of North

Western stock, was a "person * * * which has control of one or more carriers" and since Goodrich controlled Motor Freight the acquisition of Goodrich by Industries without permission of the Commission would violate the Act. The Commission rejected such contention when it denied Goodrich's petition in all respects other than granting reopening of the proceedings for the sole purpose of subjecting Industries to Section 20(5).

The Urgent Deficiency Act, 28 U.S.C. § 2321-2325,[7] sets forth the exclusive procedure for review and enforcement of

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7 § 2321. The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Insterstate Commerce Commission * * * shall be as provided in this chapter.

* * *

§ 2322. All actions specified in section 2321 of this title shall be brought by or against the United States.

§ 2323. The Attorney General shall represent the Government in the actions specified in section 2321 * * * in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right * * *.

* * *

§ 2324. The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

§ 2325. An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Commission orders: Section 2325 requires the convening of a three judge court before an "injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission [is] granted". The United States, by the Attorney General, is an indispensible party to such action in which the Commission or parties in interest may appear of their own motion. 28 U.S.C. §2322-23. As in all three judge cases, there is a direct appeal to the United States Supreme Court. 28 U.S.C. §1253. *See generally* Anderson, "Judicial Review of Decisions of the Interstate Commerce Commission", 31 Geo. Wash. L. Rev. 277 (1962). Although the statutory arrangement may be criticized as cumbersome, since orders of other administrative agencies can be reviewed or enforced by a single judge in the district court, the mandate that this be the exclusive procedure of review in Commission cases must be followed until changed by Congress.[8]

The statutory procedure for review is applicable although an order is *not directly attacked so long as the* practical effect of a successful suit would contradict, or countermand a Commission order. *Penner v. Michigan Central Railroad; Lambert Run Coal Co. v. B & O Railroad Co., supra;* Simpson v. Southwestern Railroad Co., 231 F.2d 59 (5th Cir. 1956), cert. denied, 352 U.S. 828. *See also* United States v. Southern Railway Co., 380 F.2d 49, 53 (4th Cir. 1967); United States v. Southern Railway Co., 364 F.2d 86, 92 (5th Cir. 1966), cert. denied, 386 U.S. 1031.

In order to circumvent the requirements of Sections 2321-2325 Goodrich contends that it is not attempting to "suspend, enjoin, annul or set aside" a Commission order, because no appealable order was issued by the Commission. As authority, it cites Pennsylvania Railroad Co. v. United

8 An amendment to the Act has been submitted to Congress by the Justice Department which would abolish the three judge procedure for review of Commission orders.

States, 363 U.S. 202, 205 (1960), and State of New Jersey v. United States, 168 F. Supp. 324 (D. N.J. 1958), *aff'd per curiam*, 359 U.S. 27. Neither case supports Goodrich's position.

We do not dispute the dictum relied on in Pennsylvania Railroad Company, 363 U.S. at 205, that "while a mere abstract declaration on some issue by the Commission may not be judicially reviewable, an order that determines a 'right or obligation' so that 'legal consequences' will flow from it is reviewable." But we conclude, as did the Supreme Court in *Pennsylvania Railroad Company*, that the Commission's order met the latter standard.

The Commission's order in the present case determined the right of Industries to proceed with its acquisition of Goodrich, and it denied Goodrich the opportunity to contest this issue in a reopened proceeding. The Supreme Court has said that a permissive order as well as a mandatory one is appealable, *Venner v. Michigan Central*; Chicago Junction case, 264 U.S. 258, 263 (1924), and has long abandoned the "negative order doctrine". Rochester Telephone Corportation v. United States, 307 U.S. 125 (1939). A refusal of the Commission to grant a rehearing may be appealed. *See* Atchison, Topeka & Santa Fe Railway Co. v. United States, 284 U.S. 248 (1932).

In the *State of New Jersey* case, the plaintiff appealed the refusal of the Commission to investigate its complaint, and the three-judge court held that "no order of the Commission [was] complained of" and "written notice that it would not investigate the complaint does not constitute such action as is reviewable." The action of the Commission in the present case is not, as Goodrich contends, a "failure to investigate". The Commission here issued an order which, although not crystal clear, in effect sanctions Industries' plan and refuses to reopen the proceeding at Goodrich's request.

Goodrich's argument is essentially the same as that noted and rejected in Simpson v. South Western Railroad Company, *supra*, when Judge Little said:

> "It seems to us that the appellants are here forced into the narrow position of arguing that this suit is not a suit to 'suspend, enjoin, annul or set aside' an *order* of the Interstate Commerce Commission because all it seeks is to suspend, enjoin, annul and set aside a *course* of action that the Commission order has approved and authorized." 231 F.2d at 62.

Even if we were to hold that Goodrich's complaint is not a collateral attack on a Commission order, Goodrich's suit must be dismissed for failure to state a federal cause of action. Goodrich asserted jurisdiction under 28 U.S.C. § 1337, which provides for original jurisdiction in district courts of "any civil action or proceeding arising under any Act of Congress regulating commerce". Although § 1337 creates jurisdiction it does not create a cause of action. *See* Montana-Dakota v. Public Service Co., 341 U.S. 246 (1951). Goodrich asserts a cause of action under Section 5(4) of the Act,[9] which makes it unlawful for certain acquisitions enumerated in Section 5(2) to take place without Commission approval. The enforcement provision for this section is contained in Section 5(7), which authorizes the "*Commission* * * * upon complaint or upon its own initiative without complaint * * * to investigate and determine whether any person is violating the provisions of paragraph (4)".[10]

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9 49 U.S.C. 85(4): It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, * * *".

10 49 U.S.C. § 5(7).

Section 5(11) then makes the clear statement that "The authority conferred by this section shall be exclusive and plenary".[11] The Act therefore places sole responsibility for its enforcement on the Commission. After the Commission has issued an order, the private party who considers such order in violation of the law may seek review only in the manner set forth in 28 U.S.C. § 2321-2325.

The position that only the Commission may seek judicial enforcement of Section 5 is further buttressed by Section 5(8) which provides: "The district courts of the United States shall have jurisdiction *upon the complaint of the Commission* alleging a violation of any of the provisions of this section * * *."[12]

We find nothing in the Act which would authorize a private party to bring an action in a district court to enforce Section 5. Any possible interpretation of the Act indicating such a cause of action would be at war with the statutory scheme vesting responsibility for the operation of common carriers with the Commission. *See* Gilbertville Trucking Co., Inc. v. United States, 371 U.S. 115 (1962). The acquisitions and combinations prohibited by Section 5(4) are lawful with Commission "approval"; the Commission is authorized to approve such acquisitions on terms it finds "just and reasonable". Section 5(2)(b). As Mr. Justice Black stated in Seaboard Air Line Railroad Co. v. Daniel, 333 U.S. 118, 125 (1948): "By § 5(11) of the Interstate Commerce Act * * * Congress granted the Commission 'exclusive and plenary' authority in refusing or approving railroad consolidations, mergers, acquisitions, etc. The breadth of this grant of power can be understood only by reference to § 5(2)(b) which authorizes the Commission

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11 49 U.S.C. § 5(11).

12 49 U.S.C. § 5(8).

to predicate its approval upon 'such terms and conditions and such modifications as it shall find to be just and reasonable' ".

Congress clearly placed complete initial control of acquisitions involving federally regulated carriers in the Commission. Any private party injured by a violation of the Act must seek remedial relief from the Commission. Such party must obtain an order from the Commission which may be reviewed only pursuant to 28 U.S.C. 2321-2325. This interpretation is consistent with the decision in Neisloss v. Bush, 293 F.2d 873, 878 (D.C. Cir. 1961). There, Mr. Justice Reed, sitting by designation, dismissed the complaint for failure to state a cause of action where stockholders who attacked their corporation's acquisition of the New York Central contended that the transaction violated Section 5. Justice Reed stated: "There is nothing in the statute or its history to indicate that Congress, in enacting § 5(2) meant to authorize an original action in the district court, and that it took the extraordinary step of bypassing its expert agency in the matters here involved. These matters call for the exercise of discretion and the practical application of the Commerce Act."

Goodrich seeks to distinguish *Neisloss* from the present case on the basis that *Neisloss* involved a factual determination on which the Commission had expertise, whereas its own complaint may be adjudicated solely as an issue of law, a matter in which the courts are the experts. In view of the language of Section 5, this distinction is not tenable.

Two district courts which have considered the issue of a private right of action under Section 5 have reached contrary results. Most v. Allegheny Corp. (S.D.N.Y., No. 66 Civ. 962, February 17, 1970), heavily relied on by Goodrich at oral argument, decided *inter alia* that a private cause of action for enforcement of Section 5(2)(b) may be brought

under the jurisdiction of 28 U.S.C. § 1337.[13] Judge Wyatt said: "The purpose of Section 5(11) is not to limit the jurisdiction of this Court but to make clear that a transaction authorized by the Commission can be carried into effect without regard to state or municipal law or to any other federal statute." Although one aspect of § 5(11) is to immunize parties who comply with Commission orders from violations of state and municipal laws (*see e.g. Seaboard Air Line, supra*), the language when construed in the context of the other provisions of Section 5 is not limited to that interpretation. We therefore disagree with the decision in *Most* —a decision significantly made without benefit of Commission participation.

Chicago, South Shore & South Bend Railroad v. Monon Railroad, 235 F. Supp. 984 (N.D. Ill. 1964) is in direct conflict with *Most*. In *Monon*, the court dismissed a complaint seeking an injunction against an acquisition alleged to have violated Section 5. One of the reasons set forth in the opinion which concluded that there is no private cause of action under Section 5, was the need for the Commission's expertise. Goodrich attempts to distinguish *Monon*, as did the court in *Most*, on the ground that in *Monon* there was an issue whether "control" would be achieved. Admittedly there is no dispute regarding the meaning of control in the present case. There is, however, a question whether Industries' plan for divestiture removes it from the prohibi-

13 In support of its decision, the court in *Most* said that Mississippi River Fuel Corp. v. Slayton, 359 F.2d 106, 114 (8th Cir. 1966) makes a similar construction of Section 5(11). However, such construction is far from clear since the court in *Mississippi River Fuel* recognized that the "merits or demerits and the fairness or unfairness of a proposed railroad consolidation are not, in the first instance, matters for our concern, or for the jurisdiction or concern of the district court." 359 F.2d at 113. *Mississippi River Fuel* was reversed on other grounds, *sub nom.* Levin v. Mississippi River Fuel Corp., 386 U.S. 162 (1967).

tion of the Act. There is no real distinction between these two issues. Both concern a question of statutory construction rather than a question of fact.

Goodrich seeks to justify its position that there is an implied private cause of action for enforcement of Section 5 by directing attention to decisions in which courts have inferred a private cause of action from statutes which do not specifically set forth such action. The only Supreme Court case Goodrich cites is J. I. Case v. Borak, 377 U.S. 426 (1964). Section 27 of the Securities Exchange Act of 1934, construed in *Borak*, is clearly not analogous to Section 5 of the Interstate Commerce Act. As stated in *Borak* "section [27] specifically grants the appropriate District Courts jurisdiction over '*all* suits in equity and actions at law brought to enforce any liability or duty created' under the [Securities Exchange] Act." 377 U.S. at 431. In contrast; the jurisdiction portion of Section 5 of the Interstate Commerce Act, Section 5(8), is not silent on the question of jurisdiction; it specifically gives the district courts jurisdiction "*upon the complaint of the Commission*, alleging a violation" of Section 5. Thus, the analogy of the Securities Exchange Act of 1934 may not be aptly drawn.[14] (Emphasis added).

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14 Wills v. Trans World Airlines, Inc., 200 F. Supp. 360 (S.D. Cal. 1961), cited by Goodrich, which sustained a private cause of action for damages for violation of an anti-discrimination section of the Civil Aeronautics Act, 49 U.S.C. § 1374(b), is not apposite in view of the specific statutory scheme of § 5 of the Interstate Commerce Act. Goodrich also cites Pennsylvania Motor Truck Ass'n v. Port of Philadelphia Marine Term Ass'n., 183 F. Supp. 910 (E.D. Pa. 1960) which granted an injunction against certain actions of the defendant alleged to have violated the Shipping Act of 1916 pending a determination by the Federal Maritime Board of the plaintiff's complaint. Because of the factual and statutory distinctions between that case and the present one, it does not effect our decision.

Although not raised by either party there is some question regarding the standing of Goodrich to bring an action enforcing the Act or to appeal the order of the Commission. In view of our decision that there is no private right of action to enforce Section 5 of the Interstate Commerce Act, it is unnecessary to consider who could bring such cause of action if one existed. Goodrich's standing to contest the order of the Commission in a three-judge court should, in the first instance, be decided by the district court if such suit is brought.

There is also a question whether this particular proceeding is moot inasmuch as Industries' tender off has by its terms now terminated. Since none of the parties wish to press this point, and in view of the fact that Industries has indicated that it may, in the near future, proceed with a new tender offer, we do not at this stage decline jurisdiction because of mootness.

Finally, because of our disposition of the case it is unnecessary that we address ourselves to the application of the doctrine of primary jurisdiction as discussed by Judge Steel and pressed by the parties in this appeal. 303 F. Supp. at 60. For a discussion of the application of the doctrine of primary jurisdiction to the Interstate Commerce Commission in this Circuit, *see* Seatrain Lines v. Pennsylvania Railroad Co., 207 F.2d 255 (3d Cir. 1953).

An order will be entered affirming the dismissal of the complaint.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 18,191

THE B. F. GOODRICH COMPANY

vs.

NORTHWEST INDUSTRIES, INC., and INTERSTATE COMMERCE COMMISSION

THE B. F. GOODRICH COMPANY,
a corporation of the State of New York,
Appellant

(D.C. Civil Action No. 3752)

On Appeal From the United States District Court for the District of Delaware

Present: Seitz, Van Dusen and Adams, *Circuit Judges*

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed August 11, 1969 be, and the same is hereby affirmed, with costs taxed in favor of appellees.

Attest:

Thomas F. Quinn,
Clerk.

April 14, 1970

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

(August 11, 1969)

THE B. F. GOODRICH COMPANY,

Plaintiff,

v.

NORTHWEST INDUSTRIES, INC.

Defendant,

and

INTERSTATE COMMERCE COMMISSION,

Intervening Defendant.

STEEL, DISTRICT JUDGE.

The complaint, purportedly filed under sections 1337 and 2201 of the Judicial Code, U.S.C. §§ 1337 and 2201, prays for a determination by this Court that it would be unlawful under section 5(4) of the Interstate Commerce Act; 49 U.S.C. § 5(4) for the defendant, Northwest Industries, Inc., (hereafter "Industries") to acquire control of the plaintiff, B. F. Goodrich Company (hereafter "Goodrich"), and through it, Motor Freight Corporation without first obtaining the authorization and approval of the Interstate Commerce Commission. The complaint also seeks an injunction, both permanent and temporary, under section 2202 of the Judicial Code, 28 U.S.C. § 2202, prohibiting such acquisition of control, until authorization therefor (thus far not obtained) has been secured from the Interstate Commerce Commission,

pursuant to section 5(2)(b) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(b).

The Interstate Commerce Commission has intervened in the action, and has filed a motion to dismiss the complaint on the grounds that this Court lacks jurisdiction over the subject matter and the complaint fails to state a claim upon which relief can be granted.

As a basis for the declaratory and injunctive relief sought the complaint alleges:

Goodrich owns all of the outstanding shares of Motor Freight Corporation and so controls it. Motor Freight is a motor common carrier subject to Part II of the Interstate Commerce Act and operates under certificates of convenience and necessity issued by the Commission. Goodrich also owns 100 shares of Industries. Industries owns, among other things, approximately 99 per cent of the voting stock of Chicago & North Western Railway Co. (hereafter "North Western") and controls it. North Western is a common carrier by rail subject to Part I of the Act.

Industries has made a tender offer to stockholders of Goodrich to acquire their common stock in Goodrich. The offer has been extended to August 11, 1969. Industries has placed no limit on the number of shares sought to be acquired. As of April 17, 1969, Industries owned approximately 700,000 shares which it purchased in the open market. Industries has stated it intends to acquire more than 50 per cent of the outstanding common stock of Goodrich and to obtain effective control of it. By obtaining control of Goodrich, Industries will obtain control of another carrier, Motor Freight.

The complaint alleges that it will be unlawful under section 5(4) of the Act for Industries to obtain control of Goodrich and Motor Freight without prior approval of the Commission under section 5(2)(b). It asserts that Industries has not done this, and publicly has indicated it is not

required and does not intend to do it. The complaint further alleges that Industries has announced that simultaneously with its acquisition of control of Goodrich, Industries will sell the stock of Motor Freight or place the control of Motor Freight with an independent voting trustee. This, according to the complaint, would not prevent the proposed transaction, without prior Commission approval and authorization, from violating section 5(4) of the Act.

Finally, the complaint avers that an actual controversy exists between Industries and Goodrich as to whether the transaction referred to, if carried out without the approval and authorization of the Commission, will violate section 5(4) of the Act, and that if it is so carried out will cause irreparable damage to Goodrich for which no adequate remedy at law exists.

The case is before the Court upon plaintiff's motion for a preliminary injunction as prayed for in the complaint. Also before the Court is the Commission's motion to dismiss. Affidavits for and against the motions have been filed and two documents were received in evidence at the hearing on August 6, 1969.

Jurisdiction.

Industries and the Commission both assert that the resolution of the issue presented by the complaint reposes exclusively with the Commission and this Court, therefore, is without jurisdiction to decide it. Counsel for Goodrich and for the Commission admit that they know of no decision in which a District Court has entertained an action by a private litigant to secure relief for a violation of the Interstate Commerce Act, except in instances where the Act expressly authorizes such judicial action. These statutory authorizations are specified in *Chicago, South Shore & South Bend Railroad v. Monon Railroad*, 235 F. Supp. 984, 986 (N. D. Ill.

1964). Furthermore, in the *Monon* case, the Court held that a District Court was without jurisdiction to grant any relief in a case virtually identical with that at bar and dismissed the action.

Plaintiff argues that jurisdiction should be upheld on the basis of *Pennsylvania Motor Truck Ass'n v. Port of Philadelphia Marine Terminal Ass'n*, 183 F. Supp. 910 (E. D. Pa. 1960). An analysis of that case and the provisions of the Act itself demonstrates its inapplicability to the instant case. *Pennsylvania Motor Truck* arose under the Shipping Act of 1916, not the Interstate Commerce Act. But this circumstance apart, the injunction there granted in favor of one private litigant against another was to maintain the status quo pending the processing of the merits of the dispute then pending before the Federal Maritime Board.* In the case at bar the merits of the dispute are not pending before the Commission, and hence there is no basis for plaintiff to seek a status quo order while the dispute is being resolved in a pending administrative proceeding. Here, the Court is asked to resolve the merits of the controversy, *i.e.*, whether the challenged transaction can be legally carried out without Commission approval and authorization.

Furthermore, in the *Pennsylvania Motor Truck* case the Court had merely to determine whether the provisions of a tariff constituted an "agreement", "modification" or "cancellation" as those terms were used in § 15 of the Shipping Act. The Court said that this determination called for no expertise on the part of the Federal Maritime Board and hence a judicial determination would not do violence to the role of the administrative agency.

In the respect the *Pennsylvania Motor Truck* case contrasts sharply with that at bar. The basic vice which plain-

* This distinction is not to be interpreted as an approval by this Court of the granting of a status quo order in an Interstate Commerce Act case.

tiff seeks protection against is Industries obtaining "control" of Goodrich and Motor Freight without the authority and approval of the Commission. Plaintiff plants its case upon the provisions of section 5(2) and section 5(4) of the Act. The former provides:

> "(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—
>
> (i) * * * for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise."

Section 5(2) does not state what transactions are illegal; section 5(4) does this. So far as here relevant the latter provides:

> "It shall be unlawful for any person, except as provided in paragraph 2 of this section, to enter into any transaction within the scope of subdivision (a) of section (2) of this section * * *".

Under section 5(4) the test of illegality of an unapproved and unauthorized transaction is whether the transaction is "within the scope of subdivision (a) of paragraph 2 of this section [5]".

The acquisition by Industries of a majority of the voting stock of Goodrich is not "within the scope of subdivision (a) of paragraph (2)" of section 5 simply because Industries owns 99 per cent of the stock of Northern Western and Goodrich owns all of the stock of Motor Freight. Nor does section 5(4) make such transaction unlawful, without more, absent Commission approval. The key word of section 5(2), and of section 5(4) also since it incorporates section 5(2) by reference, is "control". Unless Industries has

control of North Western and obtains control of Motor Freight by its assumed acquisition of a majority of the voting stock of Goodrich, Commission approval is not required and completion of the transaction without it is unnecessary.

In the context of the Interstate Commerce Act "control" is a word of art. It is a concept with which the Commission is uniquely qualified to deal in the light of its experience in this particular area. For this reason Congress has left it to the Commission to determine whether under all of the circumstances "control" exists in a given case. In *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 122, 125 (1962) the Court said:

> "Section 5(4) is part of a comprehensive legislative scheme designed to place ownership, management, and operational control over common carriers within the regulatory jurisdiction of the Commission.
>
> * * *
>
> We * * * have left to the agency charged with enforcement the determination from the facts whether 'control' exists, subject to normal standards of review. * * * In this manner, the Commission may adapt § 5(4) to the actualities and current practices of the industry involved and apply it to the extent it feels necessary to protect its jurisdiction under § 5(2) * * *."

Although the question which the Court in the *Pennsylvania Motor Truck* case found (rightly or wrongly) to be within the compass of judicial authority, "control" under the Interstate Commerce Act has been held in *Gilbertville Trucking Company* to be the particular concern of the Interstate Commerce Commission.

Relying upon the *Gilbertville* case the Court in *Chicago South Shore & South Bend R. v. Monon Railroad*, *supra*, 235 F. Supp. at 986, said:

"That its [Congress'] intent was to create *exclusive* primary jurisdiction in the ICC in 'control' matters of this kind is abundantly clear from the statutory scheme of the Act."

The reasoning which led the Court in *Monon* to hold that it was without jurisdiction over the subject matter of the case before it is compelling, and supports the conclusion that this Court is without jurisdiction over the subject matter of the instant case. In the interest of brevity that reasoning is not reiterated but is accepted by this Court. A dismissal of the action for lack of subject matter jurisdiction is therefore required.

Because an appellate court may take a different view of the matter, what is said hereafter is to take care of that contingency and deals exclusively with the motion for a preliminary injunction.

The Test for Issuing a Preliminary Injunction in the Present Case

A preliminary injunction will issue only upon a showing by plaintiff that it has a reasonable chance of prevailing upon final hearing, and that it will suffer irreparable injury unless temporary relief is granted. *Allis-Chalmers Mfg. Co. v. White Consolidated Indus., Inc.*, No. 17713, 3d Cir., July 18, 1969, *reversing* 294 F. Supp. 1263 (D. Del. 1969). Since, for the several reasons hereinafter stated, plaintiff has failed to establish that it has a reasonable chance of obtaining an injunction upon final hearing the question of the irreparable injury will not be dealt with.

The Administrative Action Heretofore Taken by the Commission

Even if it be assumed, arguendo, that this Court possesses jurisdiction to entertain the action, an administrative

remedy was also available to plaintiff and was utilized unsuccessfully by it. Section 5(7) of the Act authorizes the Commission, upon complaint or upon its own initiative, to investigate and determine whether any person is violating the provisions of section 5(4). If, after such investigation, it makes an affirmative finding,

> "it shall by order require such person to take such action which may be necessary, in the opinion of the Commission, to prevent continuation of such violation,"*

If anyone disobeys an order designed to prevent the continuance of a violation of the Act, the Commission may resort to judicial injunctive relief under section 5(8) against the violation. That section provides:

> "The district courts of the United States shall have jurisdiction upon the complaint of the Commission alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order."

Plaintiff recognized that administrative relief, under proper circumstances, was obtainable under sections 5(7) and 5(8). By a petition which plaintiff filed with the Commission on January 27, 1969, supplemented on March 7, 1969, plaintiff sought to reopen a proceeding then before the

* While section 5(7) speaks of enforcing a violation which is a *fait accompli*, it is reasonable to attribute to the Commission the concomitant equitable power to prevent at the outset a threatened violation of a statute. This was implicitly recognized by Goodrich in the alternative relief which it hoped to obtain by its supplemental petition filed with the Commission.

Commission, *Finance Docket No. 23388, Chicago & North Western Ry. Co.—Merger,* 330 I. C. C. 13 (1967), *sustained, in part, sub nom., Soo Line R. Co. v. United States,* 280 F. Supp. 907 (D. Minn. 1968), 333 I. C. C. 236 (1968). In the supplement of March 7, 1969, plaintiff alleged that it had acquired all of the stock of Motor Freight Corporation and controlled it, that Industries owned or controlled one or more carriers within the meaning of section 5(2), and that Industries had publicly announced its intention to acquire control of Goodrich by a tender offer to its stockholders and has taken steps to that end. It then alleged:

> "[B]ecause of Goodrich's ownership and control of Motor Freight, it will be unlawful for Industries, Inc. to acquire control of Goodrich, and thereby of Motor Freight, without first obtaining the approval and authorization of the Commission, pursuant to the provisions of sections 5(2) and (4) of the Interstate Commerce Act."

The alternative relief sought by Goodrich was stated as follows:

> "Alternatively, if it appears that Industries, Inc. intends to proceed to acquire control of Goodrich, and thereby of Motor Freight, without first obtaining the approval and authorization of the Interstate Commerce Commission, the Commission should, in the exercise of the authority conferred upon it by section 5(7) of the Interstate Commerce Act, initiate a proceeding to determine whether it should issue an order to prevent violation of the statute."*

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*The other relief sought by Goodrich, *i.e.*, subjecting Industries to the reporting requirement of sections 20(1) to (10) of the Act, and the security issuance requirements of sections 20a(2) to (11) of the Act need not presently be considered.

In short, Goodrich made the same claim before the Commission as it now makes, *i.e.*, that unless the transaction were authorized and approved by the Commission, the acquisition by Industries of a majority of the stock of Goodrich would violate section 5(4) of the Act.

On March 17, 1969, before the Commission acted upon the plaintiff's petition, as supplemented, Industries wrote the Commission and, after referring to Goodrich's assertion that it would be unlawful for Industries to acquire control of Goodrich without prior approval of the Commission, said:

> "[S]imultaneously with the acquisition of control of Goodrich the stock of Motor Freight would be sold, or, pending sale, complete control would be placed in an independent voting trustee."

In the same letter Industries sent the Commission a draft of an agreement which contemplated placing the stock of Motor Freight in trust, as to which Industries said:

> "Either in its present form or with such alterations or modifications as the Commission may suggest, we propose to enter into this agreement with a national bank in Washington, D. C. unaffiliated with Industries."

In its letter Industries also informed the Commission that the agreement which it enclosed "eliminates any possibility of Industries' acquiring control of Motor Freight".

On April 24, 1969, the Commission entered an order which denied Goodrich's petition, as supplemented, insofar as it prayed for an investigation by the Commission of Industries' tender and a determination whether the Commission should enter an order preventing a violation of the Act by Industries in the precise aspect now before this Court. In a preamble the order stated, "that the Commission has held that the placing of stock in an independent voting trust

constitutes divestiture of control thereof, *see Missouri Pacific Railroad Company—Control—Chicago & Eastern Illinois Railroad Co. et al.*, 327 I. C. C. 279."

Thus, the Commission not only denied plaintiff's request that it investigate the legality of the challenged transaction and enjoin the transaction if its unlawfulness was demonstrated, its order also referred to the prophylactic effect upon "control" which would result from the trusteeing of stock under an appropriate agreement. This action at least strongly implies, if it does not conclusively indicate, that the Commission considered that if Industries acquired momentary control over Motor Freight upon the acquisition of the Goodrich stock without Commission authorization and approval, the transaction constituted at most a *de minimus* violation of § 5(4), or that the effect of such momentary control, if it existed,* would be simultaneously dissipated by the trusteeing of the Motor Freight stock under conditions approved by the Commission which Industries proposed.

It is not necessary to determine whether the order of the Commission is a bar to the present proceeding under the doctrine of *res judicata*, although arguably under *Seatrain Lines v. Pennsylvania R. Co.*, 207 F. 2d 255, 259 (3d Cir. 1953), this may be its effect.**

---

* A preamble to the draft agreement which Industries submitted to the Commission reads:

"WHEREAS, Industries desires, by the execution of this Agreement, to preclude itself from ever acquiring control of Motor Freight and to vest in National, as its attorney-in-fact and trustee, prior to acquisition of control of Goodrich any and all power to control Motor Freight and its operations that Industries would otherwise acquire on acquisition of control of Goodrich; . . ."

** In the *Seatrain Lines* case the Court said:

"There was a contested proceeding before the Commission, with decision depending upon the present issue and the present parties taking opposite sides upon it. *Res judicata* should and does apply. (Citing cases)."

It is enough to note that the Commission impliedly found no reason to enjoin the transaction when it determined that there was no reason for investigating Industries' acquisition of the Goodrich stock notwithstanding the ownership by Goodrich of the stock of Motor Freight. The doctrine of primary administrative jurisdiction requires this Court to respect the administrative ruling implicit in the Commission's decision. In *Seatrain Lines v. Pennsylvania R. Co., supra*, the Court said, 207 F. 2d at 260:

> "We think that, once the administrative agency has made a decisive ruling defining its interest in the matter, any meaningful judicial recognition of primary administrative jurisdiction must respect the administrative ruling actually made."

Plaintiff argues that the doctrine of primary jurisdiction does not apply in this case when all that remains is for the Court to say what the plain words of the statute mean and whether an administrative body has acted in accordance with that meaning, relying on *River Plate & Brazil Conferences v. Pressed Steel Car Co.*, 227 F. 2d 60, 63 (2d Cir. 1955), which in turn was cited with approval in *Pennsylvania Motor Truck Ass'n. v. Port of Philadelphia Marine Terminal Ass'n., supra*, 183 F. Supp. at 915. This argument rests upon a false premise. It assumes that "control" as used in sections 5(2) and (4) in the context of the Interstate Commerce Act has an inflexible meaning requiring no experience or expertise to interpret it. This is contrary to the teaching of *Gilbertville Trucking Co. v. United States, supra*, 371 U. S. at 125. The determination of "control" in a particular case as a practical concept is left to the I. C. C. the agency charged with enforcement. *Allegheny Corp. v. Breswick & Co.*, 353 U.S. 151, 163, *petition for rehearing denied*, 353 U.S. 989 (1957).

The principle of primary administrative jurisdiction stated in *Seatrain Lines v. Pennsylvania R. Co., supra,* 207 F. 2d at 260, makes it highly doubtful whether on final hearing this Court would enjoin Industries from obtaining "control" of Motor Freight by acquiring the Goodrich stock, when the Commission on virtually the same record this Court has before it, refused to recognize the need for any such relief.

Whether an Injunction Should Issue Assuming Industries Is About to Violate Section 5(4)

Plaintiff argues that once Industries acquires a majority of the stock of Goodrich it cannot divest itself of its alleged control of Motor Freight by placing the stock of Motor Freight in a voting trust without having control of it before the divestiture occurs. Hence, plaintiff asserts since no prior Commission approval or authorization of the transaction has been obtained or is contemplated, the acquisition violates section 5(4) of the Act regardless of any later trusteeing of the stock.

Assuming that this is true, it does not follow from this that a preliminary injunction should necessarily issue. The Commission is authorized by section 5(7) to prevent a continuance of a violation of the Act if after investigating a transaction it finds it to be violation of the law. As section 5(7) implies the Commission's power is corrective not punitive. The justification for the remedy is the removal of the violation. The Commission has discretion in formulating the remedy. *Gilbertville Trucking Co. v. United States, supra,* 371 U. S. at 129-130. In that case the Court stated that the Commission may apply the Act "to the extent it finds necessary to protect its jurisdiction under 5(2) * * *" (p. 125), and that the duty of the Court is to give " 'complete and efficacious effect to the prohibitions of the [Interstate

Commerce Act]' with as little injury as possible to the interests of private parties or the general public." (p. 130).

Acting in accordance with these general precepts the Commission has heretofore refused to investigate Industries' proposed acquisition of the Goodrich stock and act to enjoin the consummation of the transaction if the Commission's approval is not first obtained. The Commission's action indicates that in its view the trusteeing of the Motor Freight stock under appropriate terms would be adequate to protect Goodrich and the public from any injury, even if the Act had been violated.

It has been held that the creation of an independent voting trust for stock, the prior control of which without Commission approval constituted a section 5(4) violation, was effective to avoid the violation and the Commission was authorized to give it that effect. *Illinois Central Railroad Company v. United States*, 263 F. Supp. 421, 428 (N. D. Ill. 1966); *aff'd*, 385 U. S. 457 (1967). Since the creation of an appropriate voting trust for the Motor Freight stock was in the eyes of the Commission sufficient thereafter to insulate Motor Freight from the control of Industries and to make further action by the Commission unnecessary to cure any prior violation of the Act by Industries, if any there was, no reason is apparent why this Court should take a different view of the matter. In these circumstances, the public interest in the strict enforcement of section 5(4) appears to be comparatively small, *compare Illinois Central Railroad Co. v. United States*, *supra*, p. 425, and little likelihood exists that a preliminary injunction will be issued after final hearing in the present case.

The Threat That Section 5(4) Will Be Violated

It is fundamental to the issuance of a preliminary injunction that the act sought to be enjoined is one which is threatened. Unless an action is about to occur, or is reason-

ably likely to occur, the issuance of a preliminary injunction to prevent its occurrence would be an idle exercise of judicial futility.

Singularly enough, the record contains no evidence of the number of shares of Goodrich which Industries has acquired, except to show that as of April 17, 1969, Industries owned approximately 700,000 shares of Goodrich common stock purchased on the open market. This is only slightly more than 5 per cent of the 13,783,840 shares of the Goodrich common stock which were outstanding as of December 31, 1968. Whether Industries has obtained any shares pursuant to its tender, or if it has, the number which it has acquired, is not revealed by the record. Obviously, its acquisitions are not shown to be approaching the point where control of Goodrich will pass to it.

Goodrich has been in communication with its stockholders and has vigorously recommended against their acceptance of Industries' offer. Goodrich's letter of July 23, 1969, contains potent arguments, if true and not offset by countervailing considerations, why Goodrich stockholders should not succumb to Industries' blandishments. In the face of Goodrich's adverse recommendations, the Court can make no assumption that there is a likelihood that control over Goodrich and Motor Freight will pass to Industries unless a preliminary injunction issues.

From what has been said it is apparent that there is no present and immediate danger shown by the record that Industries' tender to acquire Goodrich stock without Commission approval will, unless enjoined, give Industries the requisite control over Motor Freight essential to a violation of section 5(4).

For the several reasons heretofore stated, which constitute findings of fact and conclusions of law, the motion of Goodrich for a preliminary injunction will be denied.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

THE B. F. GOODRICH COMPANY,
Plaintiff,

v.

NORTHWEST INDUSTRIES, INC.,
Defendant,

and

INTERSTATE COMMERCE COMMISSION,
Intervening Defendant.

AND NOW, TO WIT, this 11th day of August, 1969, the motion of the Commission to dismiss the complaint, and the motion of the plaintiff for a preliminary injunction as prayed for in the complaint, having come on to be heard, and the affidavits for and in opposition to the motions, and the documents introduced in evidence at the hearing, and the briefs and arguments of the parties, having been duly considered.

IT IS ORDERED for the reasons stated in the Court's opinion dated August 11, 1969, that:

(1) The motion of the Commission to dismiss the complaint is granted; and

(2) The motion of plaintiff for a preliminary injunction is denied.

EDWIN D. STEEL, JR.

No. [redacted] 216

Supreme Court, U.S.
FILED
JUN 30 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

THE B. F. GOODRICH COMPANY,
Petitioner,

v.

NORTHWEST INDUSTRIES, INC. and
INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT NORTHWEST INDUSTRIES, INC. IN OPPOSITION

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WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

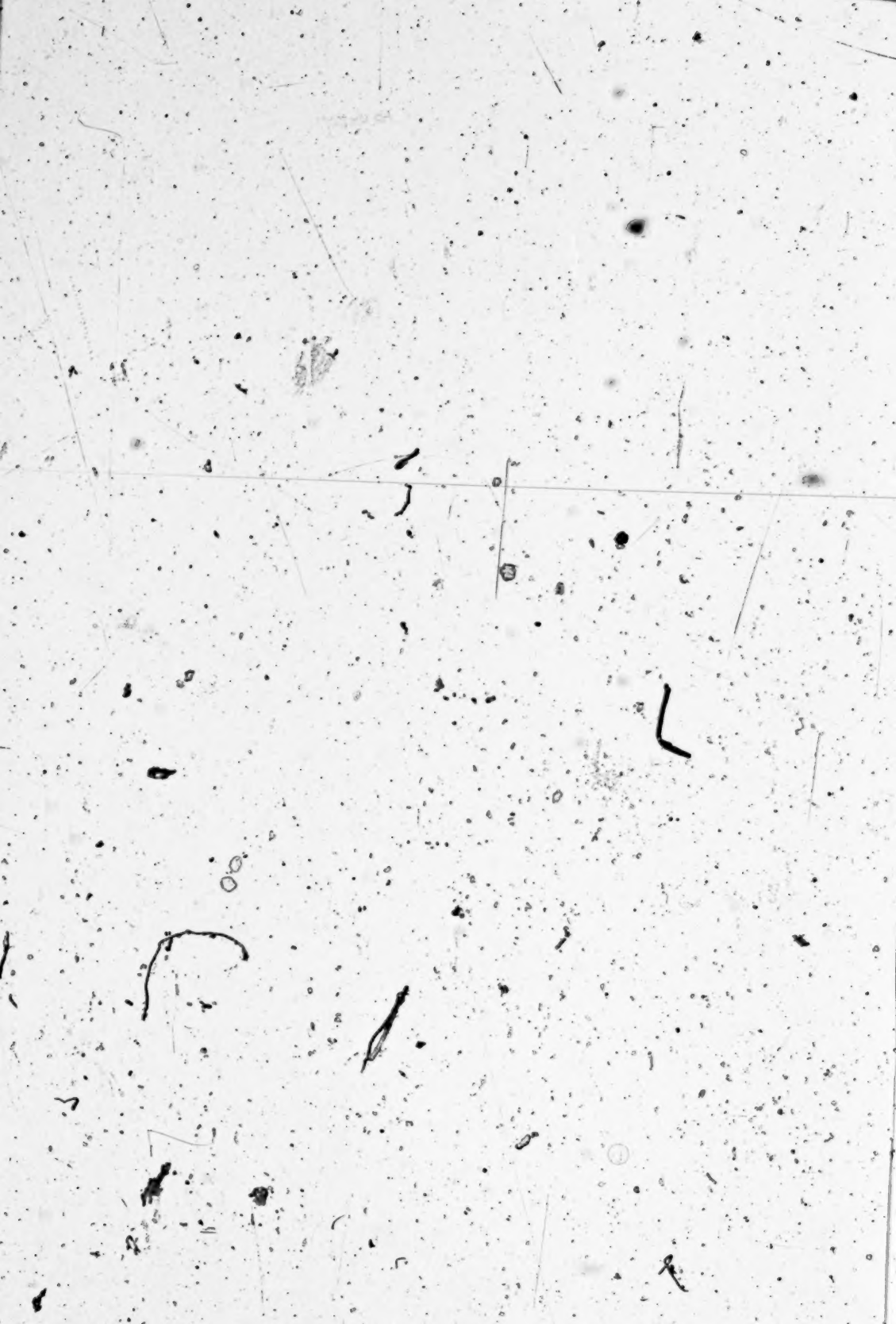


TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	5
CONCLUSION	11

CITATIONS

B. F. Goodrich Company v. *Northwest Industries*, S.D.N.Y., C.A. 69-109	7
Chicago & N. W. Ry. Co.—Merger, 333 I.C.C. 236 (1968)	5
Chicago South Shore & South Bend R. v. *Monon Railroad*, 235 F. Supp. 984 (N.D. Ill. 1964)	9
Clemens v. *Central Railroad Company of New Jersey*, 264 F. Supp. 551 (E.D. Pa. 1967), *rev'd on other grounds*, 399 F. 2d 825 (3d Cir. 1968), *cert. denied* 393 U.S. 1023 (1969)	9
Most v. *Alleghany Corporation*, —— F. Supp. —— (S.D.N.Y. 1970)	9
Neisloss v. *Bush*, 293 F. 2d 873 (D.C. Cir. 1961)	9
Penn-Central Merger and N&W Inclusion Cases, 389 U.S. 486 (1968)	8
Schwabacher v. *United States*, 334 U.S. 182 (1948)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1647

THE B. F. GOODRICH COMPANY,
Petitioner,

v.

NORTHWEST INDUSTRIES, INC. and
INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR RESPONDENT NORTHWEST INDUSTRIES, INC. IN OPPOSITION

QUESTIONS PRESENTED

Whether the federal courts should entertain a complaint requesting an injunction against an alleged violation of Section 5 of the Interstate Commerce Act when complainant previously raised the identical issues before the Interstate Commerce Commission, received an adverse determination, and failed to appeal the Commission's order.

Whether a private party's complaint, charging a violation of Section 5 of the Interstate Commerce Act, states a federal cause of action for injunctive relief.

STATUTE INVOLVED

Pertinent paragraphs of Section 5 of the Interstate Commerce Act (49 U.S.C. § 5) provide in part:

> (2)-(a) It shall be lawful, with the approval and authorization of the Commission, . . . for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise . . . .
>
> (c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.
>
> (4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, ...
>
> (7) The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. . . .
>
> (8) The district courts of the United States shall have jurisdiction upon the complaint of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by

> the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order.
>
> (11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power . . . to carry such transaction into effect . . . and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved. . . .

STATEMENT OF THE CASE

In January 1969 respondent Industries * announced an offer to exchange certain of its securities for petitioner Goodrich's stock. Goodrich's management, pursuing "a wide array of tactics in attempting to block [Industries] from making the offer" (R. 28a),** sought to interpose the Interstate Commerce Act, and procedures of the Interstate Commerce Commission, between Industries' offer and its consideration by Goodrich's stockholders. Initially, Goodrich urged that the Commission require Industries to submit for Commission approval under Section 20a of

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* Parties are here given the same shortened names used by Goodrich in its petition and by the two lower courts in their opinions.

** "R." refers to the record filed in this Court; "Pet." refers to the Goodrich petition whose appendices include both lower court opinions.

the Act the securities offered to Goodrich stockholders (R. 72a-82a).

As a second blocking effort, in March 1969, Goodrich acquired all the stock of Motor Freight, a motor carrier subject to the Commission's jurisdiction. Three days later, it filed a petition with the Commission urging that, since Goodrich now had control of a motor carrier and Industries already had control of a rail carrier, Industries' acquisition of control of Goodrich would combine two carriers in violation of Section 5 of the Interstate Commerce Act, absent the Commission's prior authorization (R. 83a-88a). Goodrich prayed that the Commission "initiate a proceeding to determine whether it should issue an order to prevent violation of the statute" (R. 86a), a move patently designed to lead to "possible hearings and protracted litigation" (R. 27a).

Industries responded to the Goodrich petition that, simultaneouly with any acquisition of control of Goodrich, it would either dispose of the carrier or deposit its stock with an independent voting trustee (R. 95a-97a). Industries laid before the Commission a draft agreement (R. 100a-110a) which (1) assigned to the trustee all authority and power Industries might otherwise acquire with respect to Motor Freight upon acquisition of control of Goodrich and (2) provided a permanent voting trust arrangement upon terms and conditions such as have been repeatedly approved by the Commission. Goodrich extensively criticized the proposed agreement (R. 234a-237a).

The Commission's order declined either to investigate the alleged prospective violation of Section 5 of the Interstate Commerce Act, or to declare that Industries' acquiring control of Goodrich would violate the Act (R. 8a-10a). The order's recital clauses noted both Industries' undertaking to deposit its stock with an independent voting trustee and that such agreements had been held effective to prevent control. The order also refused to

reopen the prior proceeding in which the Commission had determined not to compel Industries to obtain approval of its security issuances under Section 20a. See *Chicago & N. W. Ry. Co.—Merger*, 333 I.C.C. 236, 239-241 (1968).

Goodrich did not appeal this Commission order. Instead, it filed its complaint against Industries in the District Court of Delaware, alleging the same facts respecting its motor carrier acquisition and the same violation of Section 5 of the Interstate Commerce Act which it had previously put before the Commission. The Commission intervened and moved to dismiss. The District Court granted the dismissal, holding that the Court lacked subject matter jurisdiction of the complaint, that, even assuming such jurisdiction, the Court should decline it in view of the primary jurisdiction of the Commission, and that, finally, the total circumstances surrounding the litigation did not warrant issuance of an injunction.

The Court of Appeals for the Third Circuit unanimously affirmed, believing that the complaint was an impermissible collateral attack upon the Commission's order. It also agreed with the District Court that Section 5 of the Interstate Commerce Act does not permit a private action for its enforcement. It found it unnecessary to decide whether the doctrine of primary jurisdiction would also require the same result.

ARGUMENT

1. The only question which Goodrich suggests merits review—whether Section 5 of the Interstate Commerce Act permits a private action for injunctive relief—would probably not be reached should review be granted. There are other routine and compelling grounds for sustaining the action of the lower courts in dismissing the complaint.

Here, Goodrich has been to the Commission with the identical allegations, eventuating in a final order of the Commission declining the relief sought. The Court of Appeals' initial and principal holding was that, Goodrich having failed to appeal the Commission's order, its complaint constituted an impermissible collateral attack upon that order. (Pet., pp. A10-A14). It did not disagree with, but did not reach, the District Court's view that the doctrine of primary jurisdiction would clearly prevent its taking action in any event (Pet., pp. A31-A33). Both of these well-settled principles are clearly applicable, provide independent grounds for affirming the dismissal of Goodrich's complaint apart from the question sought to be reviewed, and do not warrant any exposition by this Court in the framework of this case.

There is no merit in the arguments Goodrich adduces to escape their application. Goorich's claim is that the Commission order is unclear to the point that it might be viewed as a mere "abstract declaration," and hence not appealable. The short answer given by the Court of Appeals was that the "Commission's order . . . determined the right of Industries to proceed with its acquisition of Goodrich, and it denied Goodrich the opportunity to contest this issue . . . ." (Pet., p. A13). Moreover, the Commission order is a full and explicit denial of everything which Goodrich requested in its pleadings before the Commission. If the denial did not result in an appealable order, it would be only because of Goodrich's inept pleading and failure to exhaust its administrative remedies. Clearly, under the provisions of Section 5(7), Goodrich could have filed a formal complaint whose denial or dismissal would have eliminated any possible question of appealability.

2. Goodrich urges that its case presents "serious and recurring problems" (Pet., p. 9), and that "as tender offers become increasingly common and thus more difficult to police, target corporations should not be left to

the questionable mercy of regulatory agencies which are at times overburdened with other tasks or insensitive to the necessity of compelling compliance with the statute which they are charged with administering." (Pet., p. 10).

Against the present factual background, it is singularly inappropriate for Goodrich to suggest that the Commission might have been "insensitive" to its important tasks. To the contrary, the Commission might well have been sensitive to the possibility that its processes were being misused in a contest having nothing to do with transportation and which should be settled in the market place. Transparently, Goodrich management here sought to contrive an Interstate Commerce Act problem, and thus to deny its stockholders an opportunity even to consider a tender offer which other federal statutes assured would be fairly made. The sequence of events—tender offer by Industries in January, acquisition by Goodrich of a motor carrier on March 4, and petition to so advise the Commission by Goodrich on March 7—justifies what the District Judge referred to as "suspicion in one's mind" that the affair was a "maneuver concocted by executives or more likely lawyers" (R. 179a).*

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* Depositions in another litigation arising out of the tender offer confirm the "suspicion." Goodrich hastened to acquire a motor carrier upon the advice of its counsel; the motor carrier was acquired after assurance that it was competitive with the railroad controlled by Industries. See deposition of Goodrich's chief executive officer in *B. F. Goodrich Company* v. *Northwest Industries*, S.D.N.Y., C.A. 69-409, which included the following:

"Q. Did you report to the board of directors the recommendation of Mr. Hartfield of White & Case and of Mr. Cox of the Covington firm, that your company acquire a trucking line?

A. . . . I am sure we told the board that this was recommended by White & Case and by Mr. Cox. . . .

Q. Did your board of directors, in considering the acquisition of The Motor Freight Corporation, discuss or consider the extent to which the routes serviced by that trucking line were competitive with areas serviced by the railroad facilities of Northwest Industries?

A. There was a route map present which was passed around . . ."

The case provides its own persuasive illustration why enforcement of Section 5 should be left to the Commission. Assuming *arguendo* that Industries' acquisition of control of Goodrich would violate Section 5, the resulting violation would be sterile, technical, ephemeral, and unworthy of detailed Commission attention. The Commission might well have considered that such a violation paled in comparison with the palpable misuse of its processes which Goodrich sought. The Commission certainly does not sit to ensure the tenure in office of a rubber company's management, or to prevent consideration of a tender offer by a rubber company's shareholders. The Commission should be left free to make a practical judgment on the need to enforce and the method of enforcing Section 5; it should not have enforcement partially lifted out of its hands and reposed in private litigants.

3. The Court of Appeals correctly noted that permitting a private cause of action for injunctive relief for an alleged violation of Section 5 "would be at war with the statutory scheme vesting responsibility for the operation of common carriers with the Commission" (Pet., p. A15). This Court has frequently remarked upon the comprehensive nature of Section 5, devised by Congress to encourage carrier consolidation, and the very wide discretionary powers entrusted thereunder to the Commission. See, *e.g.*, *Schwabacher* v. *United States*, 334 U.S. 182 (1948); *Penn-Central Merger and N&W Inclusion Cases*, 389 U.S. 486 (1968). The specific language of the Section, as well as its overriding purpose, makes very clear the Commission's supremacy in the area, and that the happenstance of private litigation must not in any way impede or intrude upon the Commission's exercise of its important responsibilities.

Paragraph (11) of the Section provides that the jurisdiction of the Commission shall be "exclusive and plenary," and that the Commission's approval of a consolidation provides both antitrust immunity and relief from

"all other restraints, limitations, and prohibitions of law, Federal, State, or municipal." Paragraph (7) empowers the Commission to institute an investigation of possible violations, upon its own motion or upon complaint, and to order such action as may be necessary, in the Commission's opinion, to terminate any violation it finds. To put beyond any doubt what is otherwise clear, Paragraph (8) confers upon the District Courts jurisdiction over alleged violations only "*upon the complaint of the Commission*" (emphasis added).

The only other Court of Appeals which has confronted the problem has been as emphatic as the Court below in rejecting the view that Section 5 either needs or tolerates a private action for its enforcement. *Neisloss'* v. *Bush*, 293 F. 2d 873 (D.C. Cir. 1961), involved a complaint charging that the Commission had wrongfully declined to investigate alleged violations of Section 5. Mr. Justice Reed, sitting by special designation, said that there "is nothing in the statute or its history to indicate that Congress, in enacting § 5 (2), meant to authorize an original action in the district court, and that it took the extraordinary step of bypassing its expert agency in the matters here involved" (p. 878). He continued that the matters involved "call for the exercise of discretion and the practical application of the Commerce Act" and cited with approval an earlier Supreme Court statement that the "prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce" (*Ibid.*). At least two district courts have reached the same conclusion. *Chicago South Shore & South Bend R.* v. *Monon Railroad*, 235 F. Supp. 984 (N.D. Ill. 1964); *Clemens* v. *Central Railroad Company of New Jersey*, 264 F. Supp. 551 (E.D. Pa. 1967), *rev'd on other grounds*, 399 F. 2d 825 (3d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969).

Most v. *Alleghany Corporation* —— F. Supp. —— (S.D.N.Y. 1970), which is Petitioner's principal reliance,

is distinguishable as neither involving a collateral attack on a prior Commission decision, nor presenting any factual questions of "control," such as the Court of Appeals recognized to be here present (Pet., pp. A17-A18). To the extent that the *Most* decision countenances a private action under Section 5, its authority is dubious, particularly so since it reached its decision without benefit of Commission participation, failed to meet the arguments persuasive to all other courts, and even failed to notice the *Neisloss* decision on that by the District Court below. One out-of-step district court decision, clouded as it is by the considerations given above, does not present grounds for review by this Court.

4. The case otherwise does not arise in such a posture as warrants the attention of this Court. The District Court denied relief at a time when the tender offer of Industries was still outstanding. That offer expired prior to the appeal to the Court of Appeals. Industries then and now, holds less than 17% of the voting stock of Goodrich. Industries herein repeats its advice to the Court of Appeals (1) that it has no present plan or intention to resume efforts to acquire control of Goodrich, (2) that it might, in the immediate or far future, feel compelled to make a further effort to acquire control, and (3) that it, therefore, declines to urge mootness since it wishes to give no hostages to the future.

It is, nevertheless, clear that the case involves no present controversy and no immediate practical problems. The complaint seeks injunctive relief against action which may never be attempted. Should Industries renew an effort to acquire control of Goodrich, whether Goodrich is entitled to injunctive relief may hinge on the manner in which such control is sought or on other equitable considerations which cannot now be foreseen. This Court's restricted time should not be given to private litigations which have no immediacy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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June 30, 1970

SUPREME COURT, U. S.

FILED

JUL 2 1970

CLERK

No. 33

In the Supreme Court of the United States

OCTOBER TERM, 1970

THE B. F. GOODRICH COMPANY, PETITIONER

v.

NORTHWEST TRUCKERS, INC. AND
INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF FOR THE
INTERSTATE COMMERCE COMMISSION
IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 216

THE B. F. GOODRICH COMPANY, PETITIONER

v.

NORTHWEST INDUSTRIES, INC. AND
INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A6-A19) is not yet reported. The opinion of the district court (Pet. App. A21-A35) is reported at 303 F. Supp. 53. The order of the Interstate Commerce Commission is unreported, and appears as an Appendix to this brief.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1970, and the petition for a writ of certorari was filed on June 2, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 5 of the Interstate Commerce Act is enforceable by private suit.

2. Whether the instant private action, brought before a single district judge, is an impermissible collateral attack upon an order of the Interstate Commerce Commission, which order is reviewable only by suit against the United States in a three-judge court.

STATEMENT

This litigation involves an attempt by petitioner ("Goodrich") to avert its takeover by respondent Northwest Industries, Inc. ("Industries"). The relevant facts are that Industries, a holding company controlling certain railroads, announced a tender offer for all Goodrich stock in January 1969 (Pet. App. A7, A22). Petitioner then sought to prevent the acquisition by requesting the Interstate Commerce Commission to reopen a proceeding involving Industries' control of the railroads,[1] so as to require ICC approval for securities that Industries would issue to acquire Goodrich (Pet. App. A7-A8, A28).

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[1] *Chicago & N.W. Ry. Co.—Merger—Chicago and Great Western Ry. Co.*, 333 I.C.C. 236 (1968).

In March 1969, Goodrich purchased a motor carrier, thereby creating the likelihood that Industries' control of Goodrich would violate Section 5 of the Interstate Commerce Act (49 U.S.C. 5) because it would thereby acquire control of another carrier without Commission approval (Pet. App. A8, A29). Stressing this Section 5 question, Goodrich renewed its request that the prior Industries' proceeding be reopened for imposition of securities regulation, and, in the alternative, asked the Commission to investigate the contemplated Industries-Goodrich merger to determine whether the agency should enter an order to prevent a Section 5 violation (Pet. App. A8, A28-A30).

In reply, Industries stated that, if it obtained control of Goodrich, it would sell the motor carrier Goodrich had acquired to a non-affiliated non-carrier or, pending such a sale, would place the motor carrier stock in an independent voting trust (Pet. App. A9, A30). After receiving a draft trust agreement from Industries and arguments from Goodrich, the Commission issued an order dated April 24, 1969 (Appendix, *infra*, p. 11), which reopened the proceeding for the purpose of subjecting Industries to Section 20(5) of the Act, but denied relief "in all other respects" (Appendix, *infra*, p. 13). It based this denial in part on its findings that

> * * * on March 4, 1969, B. F. Goodrich Company acquired control of Motor Freight Corporation, an interstate motor carrier, through acquisition of all the latter's common stock, that

> Northwest Industries, Inc., has stated that simultaneously with acquisition of control of B. F. Goodrich Company the stock of Motor Freight Corporation will be sold to a non-affiliated noncarrier, or, pending sale, complete control of such motor carrier will be placed in an independent voting trustee, [and] that the Commission has held in the past that the placing of stock in an independent voting trust, with necessary restrictions, constitutes divestiture of control thereof, see *Missouri Pacific Railroad Company—Control—Chicago & Eastern Illinois Railroad Company, et al.*, 327 I.C.C. 279 * * *. [Appendix, *infra*, pp. 12-13.]

Goodrich never sought judicial review of this Commission order.

On July 25, 1969, while the tender offer was open (Pet. App. A22), Goodrich filed the instant suit against Industries seeking a declaratory judgment that the acquisition would be unlawful under Section 5, and an injunction barring it until Commission approval was granted. The Interstate Commerce Commission was allowed to intervene and successfully moved to dismiss (Pet. App. A9-A10, A21-A35). The court of appeals affirmed on the ground that this litigation was an improper collateral attack upon the Commission order (Pet. App. A10-A14). In the alternative, the court held that an assumed violation of Section 5 of the Interstate Commerce Act would not give rise to a private claim on which relief could be granted (Pet. App. A14-A18).

Meanwhile, the tender offer had expired in August 1969 (R. 52a), with Industries having acquired over 16 percent of Goodrich's stock. *New York Times*, Au-

gust 16, 1969, pp. 35, 39. In its brief below, Industries stated that it had no present intention to renew the effort, but reserved the right to do so at any future time.[2]

ARGUMENT

The decision below is correct and no issue warranting plenary review is presented.

1. The court of appeals correctly held that the complaint was in substance a collateral attack upon the Commission's order which could be asserted only against the United States before a statutory three-judge court convened under 28 U.S.C. 2321-2325. Before the Commission, as here, petitioner sought to halt the Industries takeover effort on the ground that Industries would thereby acquire a carrier without Commission approval, in violation of Section 5 of the Act (Pet. App. A8). The Section 5 claim was the heart of Goodrich's position in the Commission proceeding and in the instant litigation. As the court of appeals stated, "it is clear that the Commission dealt with the same contentions made by Goodrich in the District Court" (Pet. App. A10).

After the Commission had denied relief on these contentions, Goodrich was not free to circumvent the order and the normal channels of judicial review through subsequent resort to private litigation. By

[2] On May 21, 1969, the United States filed a complaint against Industries charging that the attempted takeover would violate Section 7 of the Clayton Act (15 U.S.C. 18). See *United States* v. *Northwest Industries, Inc.*, 301 F. Supp. 1066 (N.D. Ill.). Discovery proceedings are still going forward.

seeking to enjoin the acquisition as a violation of Section 5, petitioner is plainly asking the courts to correct the Commission's decision not to act in this regard when the matter was before it. That request can be asserted only before a statutory three-judge court reviewing the Commission order, not in an independent suit brought before a single district judge. *Venner* v. *Michigan Central R. R. Co.*, 271 U.S. 127; *Lambert Run Coal Co.* v. *Baltimore & Ohio R. R. Co.*, 258 U.S. 377; *Tampa Phosphate R. Co.* v. *Seaboard Coast Line R. Co.*, 418 F. 2d 387 (C.A. 5), certiorari denied, 397 U.S. 910; *Suffin* v. *Pennsylvania R. Co.*, 396 F. 2d 75, 76 (C.A. 3), certiorari denied, 393 U.S. 1062; *Simpson* v. *South Western R. Co.*, 231 F. 2d 59, 62-66 (C.A. 5), certiorari denied, 352 U.S. 828; *Schwartz* v. *Bowman*, 244 F. Supp. 51, 68 (S.D. N.Y.), affirmed *sub nom. Annenberg* v. *Allegheny Corp.*, 360 F. 2d 211 (C.A. 2), certiorari denied, 385 U.S. 921.

There is no merit to petitioner's contention that the Commission's order was in fact unreviewable (Pet. 9, 11). Though negative in form, it had a direct and immediate impact upon the rights of the parties because it allowed Industries to pursue its attempted acquisition of Goodrich notwithstanding Goodrich's allegations that the acquisition would violate Section 5. Under such cases as *City of Chicago* v. *United States*, 396 U.S. 162, *Frozen Food Express Co.* v. *United States*, 351 U.S. 40, *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 142-143, and the well-established presumption of reviewability (*City of Chicago*, *supra*, 396 U.S. at 164; *Abbott*

Laboratories v. *Gardner*, 387 U.S. 136, 140), it was plainly a reviewable order. Cf. *Tampa Phosphate R. Co.* v. *Seaboard Coast Line R. Co.*, *supra*. Indeed, for these reasons, the Commission repeatedly conceded reviewability.

2. The court of appeals properly held that there is no private cause of action for violation of Section 5 of the Interstate Commerce Act (Pet. App. A14-A18). The statute authorizes no such suits either expressly or by implication. Sections 5(7) and 5(8) explicitly empower the Commission, with court aid when necessary, to enforce the statute. The "authority conferred by" Section 5 is "exclusive and plenary" (49 U.S.C. 5(11)). And the absence of a provision authorizing private enforcement of Section 5 is particularly significant where Congress has already created private actions for violations of other sections of the Interstate Commerce Act.[3] Cf. *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464. Moreover, approval of private suits—with Section 5 decisions being made by the courts—would necessarily restrict the Commission's present discretion to approve transactions in the public interest notwithstanding prior unauthorized control.[4] To transfer the administration of Sec-

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[3] *E.g.*, 49 U.S.C. 1(20), 8, 9, 20a(11), 322(b)(2). A private party may also bring an action to enforce a Commission order (28 U.S.C. 2321).

[4] *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 129-130; *Interstate Investors, Inc.* v. *United States*, 287 F. Supp. 374, 389 (S.D.N.Y.), affirmed *per curiam*, 393 U.S. 479; *Illinois Central R. Co.* v. *United States*, 263 F. Supp. 421, 425-430 (N.D. Ill.), affirmed *per curiam*, 385 U.S. 457.

tion 5 to the courts would be wholly inconsistent with the statutory scheme.

The decision below is supported by the weight of authority. *Neisloss* v. *Bush*, 293 F.2d 873, 878 (C.A. D.C.); *Chicago, South Shore & South Bend Railroad* v. *Monon Railroad*, 235 F. Supp. 984 (N.D. Ill.). The district court case relied upon by petitioner to support the right to bring a private suit (Pet. 13-14) did not involve a collateral attack upon an ICC order. *Most* v. *Alleghany Corp.*, CCH Fed. Sec. L. Rep., para. 92,583 (S.D.N.Y.), decided February 17, 1970. And, as the court of appeals noted, *Most* was decided "without benefit of Commission participation" (Pet. App. A17). Moreover, the district court's rationale in that case will not stand analysis. The complaint there rested on 28 U.S.C. 1337, which provides for district court jurisdiction of "any civil action * * * arising under any Act of Congress regulating commerce." But, as the court of appeals held here, although that statute "creates jurisdiction, it does not create a cause of action" (Pet. App. A14). Cf. *Montana-Dakota Power Co.* v. *Public Service Co.*, 341 U.S. 246; *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297; *Briggs Transfer Co.* v. *National Butter Co.*, 199 F. 2d 847 (C.A. 8).

Finally, the decision below does not conflict with *J. I. Case Co.* v. *Bank*, 377 U.S. 426, allowing certain private claims under the Securities Exchange Act. As the court of appeals observed (Pet. App. A18), *Borak* involved a broad statute granting district courts jurisdiction over "all suits in equity and actions at law brought to enforce any liability or duty

created" under the Act. As shown previously, the statute involved here contains no such authorization, and by its terms creates district court jurisdiction only upon complaint of the Commission.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1970.

APPENDIX

SERVICE DATE
April 28, 1969

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 24th day of April, 1969.

Finance Docket No. 23388

CHICAGO & NORTH WESTERN RAILWAY CO.—MERGER —CHICAGO GREAT WESTERN RAILWAY CO.

Finance Docket No. 23389

CHICAGO & NORTH WESTERN RAILWAY CO. STOCK AND ASSUMPTION OF OBLIGATION AND LIABILITY

Upon consideration of the record in the above-entitled proceedings including (1) the report and order of the Commission dated May 23, 1968, 333 I.C.C. 236; (2) the petition filed January 27, 1969, as last supplemented March 7, 1969, by B. F. Goodrich Company for leave to intervene and for reopening and reconsideration or, in the alternative, reopening and reconsideration on the Commission's own motion, with respect to said report and order; and (3) the reply to said petition filed January 31, 1969, as last supplemented March 17, 1969, with a trust agreement by Northwest Industries, Inc.; and

It appearing, That petitioner, as owner of 100 shares each of the stock of Northwest Industries, Inc., a noncarrier holding company which controls the Chicago and North Western Railway Company,

and of 100 shares of stock of Chicago, Milwaukee, St. Paul & Pacific Railroad Company, seeks reconsideration of that portion of the said report and order in which Northwest Industries was subjected, under the provisions of section 5(3) of the act, to the extent of requiring it to make such periodic and special reports as we may hereinafter require pursuant to sections 20(1) and (2) of the act and jurisdiction was reserved for the purpose of determining whether Northwest Industries should be subjected to further regulation at a future date, to provide, in addition, that Northwest Industries be subjected to the provisions of section 20a(2) to (11) of the act, inclusive, which relate to issues of securities and assumption of liability of carriers;

It further appearing, That petitioner alleges that Northwest Industries has acquired a block of shares of petitioner's common stock and has announced an intention to offer petitioner's shareholders certain Northwest Industries securities in exchange for the stock held by petitioner's shareholders to the detriment of Northwest Industries' common carrier subsidiaries, which, it is alleged, under some circumstances may be caused to pay excessive dividends to aid Northwest Industries;

It further appearing, That on March 4, 1969, B. F. Goodrich Company acquired control of Motor Freight Corporation, an interstate motor carrier through acquisition of all the latter's common stock, that Northwest Industries, Inc., has stated that simultaneously with acquisition of control of B. F. Goodrich Company the stock of Motor Freight Corporation will be sold to a non-affiliated non-carrier, or, pending sale, complete control of such motor carrier will be placed in an independent voting trustee, that the Commission

has held in the past that the placing of stock in an independent voting trust, with necessary restrictions, constitutes divestiture of control thereof, see *Missouri Pacific Railroad Company—Control—Chicago & Eastern Illinois Railroad Company, et al.*, 327 I.C.C. 279; and

It further appearing, That good cause has been shown for petitioner's intervention in these proceedings, and for reopening these proceedings for the sole purpose of subjecting Northwest Industries, Inc. to the provisions of section 20(5) of the Interstate Commerce Act; but that no showing has been made that the proposed issuance of securities by Northwest Industries, complained of by petitioner, would adversely affect the common carrier subsidiaries of Northwest Industries or their ability to maintain transportation service; and that there has otherwise been presented no error of fact or law with respect to the decision arrived at by the Commission in its report and order aforesaid; wherefore;

It is ordered, That the petition be granted to the extent of permitting petitioner to intervene and become a party to these proceedings; that these proceedings be, and they are hereby, reopened for the sole purpose of subjecting Northwest Industries, Inc., to the provisions of section 20(5) of the Interstate Commerce Act, and that the petition in all other respects be, and it is hereby, denied, and that as hereby supplemented, the prior orders herein shall remain in full force and effect.

By the Commission.

H. NEIL GARSON
Secretary

(SEAL)

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